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and another. From a decree for complainants, defendants appeal. Affirmed.

*Jno. C. Moomaw, C. B. & H. M. Moomaw, and R. C. Jackson*, all of Roanoke, for appellants.

*Kime, Fox & McNulty*, of Roanoke, for appellees.

VIRGINIAN RY. CO. v. BELL.

Jan. 13, 1916.

[87 S. E. 570.]

**1. Appeal and Error (§ 1003\*)—Review—Negligence—Improbability of Accident.**—In action by railway mail clerk for injury to his neck, claimed to have been caused by being struck by a sliding door in car, which had no hook and which shut on a sudden checking of the train, that the injury was different from any which might have been expected would not warrant the Supreme Court of Appeals in saying that the accident was impossible and improbable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.\* 1 Va.-W. Va. Enc. Dig. 576.]

**2. Appeal and Error (§ 997\*)—Questions of Fact—Demurrer to Evidence.**—While a demurrer to the evidence may require the Supreme Court of Appeals to accept as true that which is capable of proof, though the preponderance is greatly against it, it cannot compel it to accept as true what in the nature of things could not have occurred as narrated.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. § 997.\* 1 Va.-W. Va. Enc. Dig. 576.]

**3. Appeal and Error (§ 987\*)—Questions of Fact.**—The Supreme Court of Appeals cannot consider the weight of the evidence or the credibility of the witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.\* 1 Va.-W. Va. Enc. Dig. 592.]

**4. Appeal and Error (§ 1099\*)—Former Appeal—Law of Case.**—The holding on a former appeal by defendant carrier in a railway mail clerk's action for injury, when the door of the car shut by a sudden stop of the train, that the defendant's negligence and the plaintiff's contributory negligence were questions for the jury was the law of the case on a second appeal, where the evidence at the trial was not substantially different from that given on the first trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.\* 1 Va.-W. Va. Enc. Dig. 592.]

**5. Evidence (§ 553\*)—Expert Testimony on Hypothetical Question—Assumption of Fact.**—In a railway mail clerk's action for injury to his neck when the door of the car shut as the train was being

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

checked, a question to plaintiff's medical expert as to whether, considering the size, travel, and adjustment of the door, the speed of the train, and its alleged sudden stop, and assuming that one side of plaintiff's neck was against the door jamb, the blow from the door would be sufficient to fracture a cervical vertebra was improper, as assuming that plaintiff's neck was against the door when there had been no proof that it was, and that there was a sudden stop when the proof showed only a more or less sudden checking of the train.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. § 553.\* 5 Va.-W. Va. Enc. Dig. 781.]

**6. Evidence (§ 528\*)—Opinion Evidence—Scope of Testimony.**—The expert, while he might properly express his opinion as to the force necessary to cause the fracture, could not give his opinion as to how violent would be the blow from a door of given size and weight upon the application of air brakes upon a train running at a given speed, where he had no personal experience or knowledge in relation to such doors.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2335-2337; Dec. Dig. § 528.\* 5 Va.-W. Va. Enc. Dig. 781.]

**7. Evidence (§ 507\*)—Expert Testimony—Force of Blow.**—The elements involved in determining the force of the blow were matters of common knowledge and experience.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2310; Dec. Dig. § 507.\* 5 Va.-W. Va. Enc. Dig. 781.]

**8. Appeal and Error (§ 1049\*)—Harmless Error—Admission of Evidence.**—The admission of the expert's opinion as to the force of the blow, going to the main contested question of fact, was prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4186; Dec. Dig. § 1049.\* 1 Va.-W. Va. Enc. Dig. 592.]

**9. Evidence (§ 383\*)—Expert Testimony—Injury to Neck—Comparison by X-Ray Pictures and Skeleton.**—In a railway mail clerk's action for injury to his neck, fracturing the transverse process of the third cervical vertebra, when the door of the car shut when the train was more or less suddenly checked, where his medical expert, whose experience as an X-ray specialist was limited, offered two X-ray plates of plaintiff's neck and explained them to show a fracture, the refusal to allow an X-ray specialist for defendant to exhibit to the jury an X-ray picture taken by him, showing a man's neck in normal condition to prove that plaintiff did not have such a fracture, with the explanation that the plaintiff's fracture did not support the interpretation of his expert was erroneous; and a skeleton offered by plaintiff to show a normal neck in comparison to an

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

abnormal one, and the general form and structure of the bones, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. § 383.\* 5 Va.-W. Va. Enc. Dig. 777.]

Error to Circuit Court, Montgomery County.

Action by O. C. Bell against the Virginian Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, verdict set aside and cause remanded for new trial.

*Hall & Woods*, of Roanoke, *Roop & Phlegar*, of Christiansburg, and *G. A. Wingfield*, of Norfolk, for plaintiff in error.

*A. P. Staples, Jr.*, of Lexington, and *A. B. Hunt*, of Roanoke, for defendant in error.

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HAIRSTON et al. v. HILL et al.

Jan. 13, 1916.

[87 S. E. 573.]

**1. Mines and Minerals .(§ 58\*)—“Contract” to Lease—Validity.**—Where the owners of ore lands for pecuniary consideration, agreed in writing to lease to a defendant all the iron ore in, under, and upon a tract of land, together with all rights of way for railroads, etc., necessary for mining, removing, and shipping the ore, and the use of timber for a term of 25 years from the date of the lease, for the price of 25 cents per ton royalty for ore, which agreement contained stipulations that it should become void unless defendant should commence to develop the property, pay minimum royalties, etc., and that the owners would sell on or before fixed dates at fixed minimum prices, such instrument was a valid contract, and not a mere option, as it contained all the essential elements of a good executory contract; i. e., competent parties, legal subject-matter, valuable consideration, and mutual assent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 168, 169; Dec. Dig. § 58.\* 9 Va.-W. Va. Enc. Dig. 832.]

For other definitions, see Words and Phrases, First and Second Series, Contract.]

**2. Contracts (§§ 154, 170\*)—Construction.**—In the interpretation of contracts regard must be given to the intention of the parties and their version of the instrument's meaning while an unreasonable construction is always to be avoided.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 735, 753; Dec. Dig. §§ 154, 170.\* 3 Va.-W. Va. Enc. Dig. 395.]

**3. Mines and Minerals (§ 58\*)—Contract to Lease—Validity—Con-**

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\*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.